

Nova Law Review

Volume 24, Issue 3

2000

Article 2

A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus

William E. Adams*

*

Copyright ©2000 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus

William E. Adams, Jr.*

TABLE OF CONTENTS

I. INTRODUCTION	751
II. CRIMINAL LAW—SODOMY AND HATE CRIME LAWS	753
III. ANTIDISCRIMINATION LAWS/BALLOT INITIATIVES	756
IV. “FAMILY” LAW ISSUES	760
V. FUTURE TRENDS	767

I. INTRODUCTION

As summarized by the late Allan Terl in this issue,¹ the history of the treatment of lesbian, gay, bisexual, and transgendered (“LGBT”)² persons in Florida has been marked by “witch hunts” for lesbian and gay teachers,³ political attacks through voter initiatives,⁴ overtly discriminatory laws,⁵ and

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. A.B., 1975, Indiana University; J.D., 1978, Indiana University.

1. Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 23 NOVA L. REV. 793 (2000).

2. It must first be acknowledged that the legal treatment of lesbians and gays sometimes raises different issues than it does for bisexual and transgendered persons. For example, Florida’s ban on “homosexual” adoptions would apparently not prevent a bisexual person from adopting as long as that person was not currently engaged in a sexual relationship with a person of the same sex. Because transgendered persons are discriminated against due to their gender and sexual orientation, the application of laws, primarily aimed at homosexuals, is not always clear. *See generally* Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgendered Jurisprudence*, 70 TEMP. L. REV. 283 (1997) (discussing the current public policy against transgendered persons and how the policy has manifested itself under federal antidiscrimination case law). However, for the most part, the laws and cases in Florida, which have addressed the issue of homosexuality, also have relevance to bisexuals and transgendered persons, even if they are not usually discussed directly in those cases and statutes.

3. *See* Terl, *supra* note 1, at 796.

4. For a discussion of anti-gay ballot measures, *see* Terl, *supra* note 1, at 829–48; William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny and Direct Democracy*, 55 OHIO ST. L.J. 583, 590 (1994) [hereinafter Adams I].

case law that has been mixed in the recognition of equal rights.⁶ This article will address what has happened since Terl's untimely death in 1997, describing the current legal and political climate for LGBT persons in Florida, analyzing recent trends and suggesting future directions. As a strong advocate for equal rights for LGBT persons, Terl would no doubt feel encouraged by some of the political and legal developments in the last few years, but he undoubtedly would still be concerned about some of the issues that continue to be contested in the political and judicial spheres. Expanding upon his excellent summary of the history of Florida's treatment of its LGBT residents, this article shall attempt a critical analysis of the case law generated by Florida courts and compare its treatment to that of other jurisdictions in this country.

To maintain consistency with the scope of the historical article by Terl and to keep this summary manageable, this article will focus on areas of the law highlighted in the Terl article.⁷ This approach is also consistent with the areas of the law that have generated the predominant amount of attention from both advocates for equality for LGBT persons and their opponents in the legislative and judicial arenas in the last three years.⁸ This emphasis means that a few areas where some legal action has taken place will not be discussed. Thus, for example, this article will not address case law in the area of defamation in relation to homosexuality.⁹ In addition, this article will not address issues concerning lesbians and gays in the school setting, which, although important, has not seen any significant change in the law since the Terl article was written.¹⁰

5. See, e.g., FLA. STAT. § 63.042(3) (1999) (Florida's statute banning "homosexual" adoptions); *Id.* § 741.212 (Florida's statute banning same-sex marriage); *Id.* § 800.02 (Florida's "sodomy" statute).

6. See Terl, *supra* note 1, at 821-31.

7. *Id.* at 793.

8. See *id.* at 821-51.

9. For an approach to the area of defamation, see *Hoch v. Rissman*, 742 So. 2d 451, 455-57 (Fla. 5th Dist. Ct. App. 1999) (reversing summary judgment in favor of defendants in an action concerning statements made at a law firm seminar discussing "inside" information about the tendencies and proclivities of lawyers and judges working in the area of workers compensation, and holding that the statement "'if you wanted to prevail . . . before Rand Hoch, you should send a boy in short pants'" constitutes slander per se as it "imputes conduct or a condition incompatible with the proper exercise of his judgeship").

10. Allan Terl's article was written in 1997. The last major development concerning gays and lesbians in the school setting is discussed in Terl, *supra* note 1, at 810-15, 832.

II. CRIMINAL LAW—SODOMY AND HATE CRIME LAWS

Historically, the criminal law has been used as a weapon against members of sexual minority groups, usually through the enactment of laws outlawing sodomy or similar sexual practices.¹¹ This type of criminal statute still exists in a number of states.¹² On the other hand, the criminal law is beginning to be used in a positive fashion to protect lesbians and gays from violence motivated by animus against them.¹³ These laws, popularly referred to as "hate crime" laws, are increasingly including sexual orientation in the list of protected categories.¹⁴

As has been noted elsewhere, the battle for the rights of lesbians and gays is often dependent upon a state's position concerning the criminalization of same-sex sexual conduct.¹⁵ Even though sodomy laws are often not enforced against adults engaged in the prohibited sexual acts in private, the laws have had a pernicious impact upon gays and lesbians in a wide variety of legal contexts. Litigants in cases in jurisdictions with sodomy laws in which homosexuality is an issue often are required to discuss the impact of existing sodomy laws upon the legal issue before the court. Thus, the cases concerning the recognition of the existence of lesbian and gay student organizations have often had to address arguments that the organization could lead to the violation of criminal laws.¹⁶ Sodomy laws

11. See, e.g., Act of Aug. 6, 1868, ch. 1637, § 7, 1881 Fla. Laws 8, 374–76, *repealed* by Ch. 74–121, § 1, 1974 Fla. Laws 371, 372. This section of the *Florida Statutes*, § 800.01, was held unconstitutional in *Brinson v. State*, 278 So. 2d 317 (Fla. 1st Dist. Ct. App. 1973), and then repealed by the Florida Legislature in 1974.

12. See, e.g., ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. CRIM. CODE ANN. § 21-3505 (West 1995); OKLA. STAT. ANN. tit. 21, § 886 (West 1999); TEX. PENAL CODE ANN. § 21.06 (West 1998). See also *infra* notes 23–27.

13. See, e.g., FLA. STAT. § 775.085(1)(a) (1999) (stating that "[t]he penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on . . . sexual orientation . . . of the victim").

14. See, e.g., *id.*

15. See, e.g., Abby Rubenfeld, *Lessons Learned: A Reflection upon Bowers v. Hardwick*, 11 NOVA L. REV. 59 (1986) (discussing the background, importance, and future ramifications of the *Bowers* decision).

16. Dan Hawes, National Gay and Lesbian Task Force, 1999 Capital Gains and Losses: A State by State Review of Gay, Lesbian, Bisexual, Transgender, & HIV/AIDS-Related Legislation in 1999 9 (1999). See also *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984) (holding that university's justifications for refusing to officially recognize homosexual student group were insufficient to justify infringement of the group's First Amendment rights); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977) (holding that reliance on opinions by psychiatrists that homosexual student organization as campus

were sometimes cited as a reason for denying incorporation to groups.¹⁷ As noted in the Terl article, the right of gays and lesbians to be admitted to practice law in Florida was placed in issue because of Florida's sodomy law.¹⁸

In Florida, the criminal statute outlawing "unnatural and lascivious acts"¹⁹ is deemed to outlaw sexual conduct between members of the same sex,²⁰ although the Supreme Court of Florida has never stated definitively that it covered private consensual same-sex conduct between adults.²¹ Although some have believed that the state's broad Privacy Amendment²² would negate this law's application to homosexual conduct, it has not yet been so construed. If the statute does still outlaw private consensual same-sex sexual activity, it places Florida in a minority of states.²³ Presently,

organization would tend to perpetuate or expand homosexual behavior was insufficient to justify governmental prior restraint on right of group to associate); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) (holding that university's refusal to register association on same terms and conditions as those applied to other student organizations violated student organization's First and Fourteenth Amendments); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (holding that prohibiting organization from holding social activities on campus denied members' right of association).

17. See *In re Thom*, 40 A.D.2d 787 (N.Y. App. Div. 1972) (overturning lower court decision denying recognition of Lambda Legal Defense and Education Fund, founded to litigate, educate, and engage in public policy work for lesbians and gay men, as a public interest organization), *rev'd by Application of Thom*, 301 N.E.2d 542 (N.Y. 1973) (*rev'd per curium*).

18. Terl, *supra* note 1, at 795, 806, 811–12, 851–53. For a discussion of this problem in other states, see generally Eric H. Miller, Annotation, *Sexual Conduct or Orientation as Ground for Denial of Admission to Bar*, 21 A.L.R. 4TH 1109 (1983).

19. FLA. STAT. § 800.02 (1999). For a discussion of the vagueness of many statutes that outlaw same-sex sexual behavior, see Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

20. § 800.02. See Terl, *supra* note 1, at 794 n.7 (citing cases discussing the application of the statute to members of the same sex).

21. See *Cox v. Florida Dep't of Health & Rehab. Servs.*, 656 So. 2d 902, 904 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (noting that, under the state's interpretation of the statute, private, consensual sexual activity between adults of the same sex was not covered).

22. FLA. CONST. art. I, § 23 (amended 1980).

23. Sixteen states still have some form of "sodomy" statute in effect. See *State-by-State Sodomy Update* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275>>. For a listing of the 16 states, see *infra* note 24. Contrary to recent trends, Oklahoma increased the penalties for sodomy from ten to twenty years. OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 2000). See also HAWES, *supra* note 16, at 120.

sixteen states²⁴ outlaw some types of private consensual sexual activity between adults with four²⁵ of these states limiting the bans to sexual acts between members of the same sex.²⁶ Florida is one of the thirteen states that ban such activity between opposite-sex as well as same-sex couples.²⁷ Although *Bowers v. Hardwick*²⁸ rejected a challenge to the constitutionality of such laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution,²⁹ a growing number of states have recognized challenges pursuant to their state constitutions.³⁰

24. Alabama, Arizona, Arkansas, Florida, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. *State-by-State Sodomy Update*, *supra* note 23.

25. Arkansas, Kansas, Oklahoma, and Texas. *Id.*

26. The Arkansas, Texas, Virginia, and Louisiana statutes are currently being challenged in court. See *State-by-State Sodomy Law Update*, *supra* note 23. For a more in-depth discussion of the challenges in Arkansas and Texas, see *Lambda: Just Days Apart, Courts in Texas and Arkansas Hear Challenges to Sodomy Law* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=490>> (discussing the background and current status of the Arkansas case of *Picado v. Pryor*, No. CV-99-7048 and the Texas cases of *Lawrence v. Texas*, No. 14-99-00111-CR, and *Garner v. Texas*, No. 14-99-00199-CR).

27. See FLA. STAT. § 800.02 (1999).

28. 478 U.S. 186 (1986). Much legal scholarship has been generated by this decision, most of it critical. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

29. But see *Romer v. Evans*, 517 U.S. 620, 638 (1996) (Scalia, J., dissenting) (disputing the denial of equal protection of homosexuals under the law).

30. See *Powell v. State* 510 S.E.2d 18 (Ga. 1998) (holding sodomy statute violates privacy guarantees in due process clause of state constitution); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (holding sodomy statute violates privacy and equal protection guarantees of state constitution); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (holding sodomy statute violates privacy guarantees in state constitution and state's interest in promoting either public health or morals was not a compelling state interest to warrant the infringement of privacy rights); *People v. Onofre* 72 A.D.2d 268 (N.Y. 1980) (holding sodomy statute violates federal constitution); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (holding sodomy statute violates equal protection clause of state constitution); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding sodomy statute violates privacy guarantees in state constitution). In 1999 a Baltimore circuit court found the Maryland statute to be unconstitutional, and the Maryland Attorney General agreed to stop enforcing the statute rather than appeal the decision. See *Lambda Legal States: Maryland* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/states/record?record=20>>. See also HAWES, *supra* note 16, at 10, 75. But see *State v. Baxley*, 656 So. 2d 973 (La. 1995) (holding that a statute punishing solicitation of oral or anal sex for compensation did not violate the state constitution's equal protection guarantee); *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (upholding sodomy statute); *State v. Morales*, 826 S.W.2d 201 (Tex. App. Ct.

Turning to the use of the criminal law to protect LGBT persons, Florida is one of the states that provides increased penalties for and collects data concerning crimes motivated by a bias against a person because of his sexual orientation.³¹ The federal government requires the United States Department of Justice to collect and report information concerning violent crimes related to a number of categories, including sexual orientation, under the Hate Crime Statistics Act.³² "Twenty-three states and the District of Columbia have established some sort of mechanism to respond to and/or record information about hate crimes related to sexual orientation."³³ Although there are some criticisms of these types of statutes,³⁴ there appears to be a trend for their passage.³⁵

Florida therefore finds itself in regard to its approach to LGBT persons in the criminal law area with one foot in the past and one tentatively stepping out towards the future. Finding itself in a dwindling number of states, mostly southern, that still criminalizes consensual same-sex sexual conduct between adults, it remains tied to a tradition that most other states have either chosen to abandon or are seriously reconsidering. On the other hand, the legislature's inclusion of sexual orientation in its hate crimes legislation places the state clearly within the trend toward this type of protective legislation during the past decade.

III. ANTIDISCRIMINATION LAWS/BALLOT INITIATIVES

Currently, eleven states and the District of Columbia ban discrimination on the basis of sexual orientation in private employment through legislation.³⁶ One hundred six municipalities and eighteen counties ban

1992) (declaring sodomy statute unconstitutional), *rev'd* State v. Morales, 869 S.W.2d 941 (Tex. 1994) (holding that civil court lacked jurisdiction to consider constitutionality of criminal statute). Challenges are currently underway in Arkansas, Virginia, Louisiana, and, once again, Texas. See *supra* note 26.

31. FLA. STAT. § 775.085 (1999).

32. 28 U.S.C. § 534 (1994).

33. Wayne van der Meide, *Legislating Equality, A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* 7 (1999).

34. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 462 (1999); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 23 HARV. C.R.-C.L. L. REV. 387 (1994).

35. See Kahan, *supra* note 34, at 462-63.

36. VAN DER MEIDE, *supra* note 33, at 4. The 11 states are: California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.* See also *Summary of States Which Prohibit Discrimination Based on Sexual Orientation* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=185>> [hereinafter *Summary of States*]. Through an

sexual orientation discrimination in private employment.³⁷ Eighteen states and the District of Columbia prohibit such discrimination in public employment.³⁸ Nine states and the District of Columbia prohibit sexual orientation discrimination in public accommodations and housing.³⁹ With the addition of local government ordinances, it is estimated that approximately thirty-eight percent of the population of the United States is therefore protected against discrimination on the basis of sexual orientation in private employment.⁴⁰ Most of these protections have been passed during the 1990s, including ten of the twelve states that have enacted such legislation.⁴¹

In Florida, the cities of Gainesville, Key West, Miami Beach, Tampa, and West Palm Beach and the counties of Broward, Monroe, and Palm Beach have passed laws banning discrimination on the basis of sexual orientation.⁴² Alachua County passed such an ordinance in 1993, but it was

appellate decision, Oregon has declared sexual orientation discrimination to be illegal. *See Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 442 (Or. Ct. App. 1998) (holding that university's denial of insurance benefits to employees' domestic partners violated privileges and immunities clause of Oregon Constitution). In 1997, Maine outlawed sexual orientation discrimination. Human Rights Act, ch. 205, 1997 Me. Legis. Serv. 205 (West) (codified as amended at ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1999)). The 1997 amendment, however, was repealed pursuant to a voter referendum which took place February 10, 1998. *See Lambda Legal States* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/states/record?record=19>>. The amendment that would have banned sexual orientation discrimination never went into effect because of a "people's veto." *Id.*

37. VAN DER MEIDE, *supra* note 33, at 83–84. *See also Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation* (visited April 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217>> [hereinafter *Summary of States, Cities, and Counties*].

38. VAN DER MEIDE, *supra* note 33, at 83–84. The 18 states are: California, Colorado, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. *Id.* *See also Summary of States, Cities, and Counties, supra* note 37.

39. *See Summary of States, Cities, and Counties, supra* note 37. The nine states are California, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.*

40. VAN DER MEIDE, *supra* note 33, at 11.

41. *Id.* at 9.

42. Gainesville, Fla., Code of Ordinances §§ 8-1 to 8-6, 8-21 to 8-22, 8-48 (1999); Key West, Fla., Code § 72 (1999); Miami Beach, Fla., Code § 62-32 (1999); Tampa, Fla., Code of Ordinances §§ 12-1 to 12-114 (1999); West Palm Beach, Fla., Ordinance § 90-1 (1999). *See also Lambda Legal Status: Florida* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/states/record?record=9>>.

repealed by a voter referendum in November 1994.⁴³ A similar ordinance was passed in 1998 in Gainesville, which is in Alachua County.⁴⁴ Hillsborough County passed an ordinance in 1991, but the County Commission repealed it in 1995.⁴⁵ As was noted in the Terl article,⁴⁶ Dade County passed an ordinance,⁴⁷ which was repealed by a voter referendum in 1977,⁴⁸ and the Miami-Dade County Commission again considered amending its antidiscrimination law to include sexual orientation more than twenty years later.⁴⁹ After first rejecting the amendment on a perfunctory first reading, the Commission reversed itself and passed the ordinance in December, 1998.⁵⁰ Approximately a year after its passage, opponents have received permission to seek signatures to place a referendum before the voters to repeal the protection.⁵¹ As has been true of similar measures attempted across the state, this effort has been supported by the Florida Family Association, based in Tampa.⁵² Thus, as this article goes to press,

43. See *Lambda Legal Status: Florida* (visited Apr. 10, 2000) <<http://www.lambda.legal.org/cgi-bin/pages/states/record?record=9>>.

44. GAINESVILLE, FLA., CODE §§ 8-1 to 8-6, 8-21 to 8-22, 8-48 (1999) (enacted Dec. 14, 1998).

45. HILLSBOROUGH COUNTY, FLA., ORDINANCE § 88-9, amended by ORDINANCE §§ 88-26, 90-2, 99-1. The repeal was reported in *County Kills Gay Rights Law*, MIAMI HERALD, May 18, 1995, at 5B.

46. Terl, *supra* note 1, at 803-04.

47. DADE COUNTY, FLA., CODE OF ORDINANCE, § 11A-1 (1977) (formerly Ordinance § 77-4).

48. Carl Hiaasen, *Gay Rights Law is Defeated*, MIAMI HERALD, June 8, 1997, at 1A.

49. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES, ch. 11A (1999) (amended on Dec. 1, 1998). See also Terl, *supra* note 1, at 804.

50. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES, ch. 11A (1999). Thirty complaints were filed during the first year the ordinance was in effect, with one quarter of those complaints being settled. Don Finefrock, *Foes of Gay-Rights Law Starting Drive for Repeal*, THE MIAMI HERALD, Feb. 9, 2000, at B2.

51. Finefrock, *supra* note 50, at B2. Because the county's referendum laws require signatures from only four percent of the registered voters, many observers felt that the group would be able to get the measure placed on the ballot. *Id.*

52. The Florida Family Association has twice unsuccessfully attempted to repeal the antidiscrimination ordinance in Tampa, but successfully helped to repeal an Alachua County ordinance. Don Finefrock, *New Fight Nears as Foes Target Rights of Gays, Lesbians*, MIAMI HERALD, Feb. 3, 2000, at 1B. The same group also attempted to place a statewide referendum on the Florida ballot that would have banned the passage of such laws in Florida. The referendum is similar to Amendment 2 in Colorado, which was declared unconstitutional by the United States Supreme Court in *Romer v. Evans*. 517 U.S. 620, 635 (1996). The Florida measure was declared a violation of the single-subject matter requirement respecting ballot measures. *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1019 (Fla. 1994). See Terl, *supra* note 1, at 841-42.

Miami-Dade County is confronted with the possibility of a repeat of the Anita Bryant campaign.

The threat of the ballot initiative against the LGBT community continues across the country.⁵³ In spite of the *Romer v. Evans*⁵⁴ decision by the Supreme Court of the United States, repeal efforts aimed at antidiscrimination provisions that cover sexual orientation continue.⁵⁵ In addition, the approval by voters on March 7, 2000 of California's Proposition 22,⁵⁶ the so-called "Knight Initiative" that seeks to limit marriage to opposite sex couples, may spur more voter initiatives that limit the rights of lesbians and gays in relation to marriage and other family issues.⁵⁷ Although these other initiatives pose threats to lesbians and gays, most involve passage of laws as opposed to constitutional amendments like the Florida process, so the harm is arguably less serious from a legal structure perspective.

In summary, in regard to antidiscrimination laws, Florida has seen passage of local ordinances in most of its largest urban centers, although not without controversy and debate.⁵⁸ The state legislature has not seriously

53. For a critique of the harm caused by ballot initiatives against lesbians and gays, see, Adams I, *supra* note 4, at 594; William E. Adams, Jr., *Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998) [hereinafter Adams II]; William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419 (1997); Hans Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361 (1997); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994). For a spirited defense against the critics of the initiative process in general, see Clayton P. Gillette, *Plebicides, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 942 (1988).

54. 517 U.S. 620 (1996).

55. The State of Maine repealed its state statutory provision outlawing sexual orientation discrimination by a vote of 52% to 48%. Adams II, *supra* note 53, at 461 (citing Carey Goldberg, *Forced to Act on Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, at A2). During the 2000 elections, the city of Ferndale, Michigan repealed its antidiscrimination ordinance. Bill Laitner, *Voters Say No to Rights Ordinance*, DETROIT FREE PRESS, Feb. 23, 2000, at B1.

56. 2000 Cal. Leg. Serv. Prop. 22 (West) (codified at CAL. FAM. CODE § 308.5 (West 2000)) (enacting the California Defense of Marriage Act which states "[o]nly marriages between a man and a woman is valid or recognized in California").

57. See VANDER MEIDE, *supra* note 33, at 8.

58. See, e.g., BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-150 (1999) ("Broward County Domestic Partnership Act of 1999"); PALM BEACH COUNTY, FLA., CODE § 15-58 (1999) (prohibiting discrimination based on sexual orientation in housing practices); MIAMI-DADE, FLA., CODE OF ORDINANCES ch. 11A (1999) (prohibiting discrimination based

considered such protection, however, unlike over half of the nation.⁵⁹ As has been indicated in this and the Terl article, the ballot initiative process has successfully been used in Florida to repeal protections in various localities.⁶⁰ These campaigns are often divisive, frequently appealing to fear and prejudice.⁶¹

IV. "FAMILY" LAW ISSUES

Whereas the antidiscrimination battles have mostly been waged in the political arena, the fight for equality in the family law area has seen more battles in the judicial arena. One notable exception is Florida's legislation forbidding the recognition of same-sex marriage.⁶² The Florida statute is similar to those passed in twenty-nine other states,⁶³ and is also similar the federal government's Defense of Marriage Act.⁶⁴ The relevance of this

on sexual orientation in public and private employment, public accommodations, and housing).

59. In addition to the states that have passed antidiscrimination measures, 19 other states considered such legislation in 1999, with bills making significant progress in at least five of them. HAWES, *supra* note 16, at 7. In Hawaii, Maryland, and New York, one of the two legislative bodies passed a nondiscrimination bill. *Id.* In Illinois a similar bill failed by two votes in its House of Representatives. *Id.* In Delaware, the failure was by three votes in its House of Representatives. *Id.*

60. See Terl, *supra* note 1, at 839.

61. See, e.g., Adams II, *supra* note 53, at 467-77.

62. FLA. STAT. § 741.212 (1999).

63. See ALA. CODE § 30-1-19 (1999); ALASKA CONST., art I, § 25; ALASKA STAT. § 25.05.013 (Michie 1999); ARIZ. REV. STAT. ANN § 25-101 (West 1999); ARK. CODE ANN. §§ 9-11-107, 109, 208 (Michie 1999); CONN. GEN. STAT. ANN. § 46a-81r (West 1999); DEL. CODE ANN. tit. 13, § 101 (1999); GA. CODE ANN. § 19-3-3.1 (Harrison 1999); HAW. CONST., art. I, § 23 (amended 1997); HAW. REV. STAT. ANN. §§ 572-1.6, 572-12 (Michie 1999); IDAHO CODE § 32-209 (1999); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE ANN. § 31-11-1-1 (West 1999); IOWA CODE ANN. § 595.2 (West 1999); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. § 402.020, .040, .045 (Michie 1998); LA. REV. STAT. ANN. art. 86, 89, 3520 (West 1999); ME. REV. STAT. ANN. tit. 19, § 701 (West 1999); MD. CODE ANN., [FAMILY LAW] § 2-201 (1999); MICH. COMP. LAWS ANN. §§ 551.1, .271, .272 (West 1999); MINN. STAT. ANN. §§ 363.021, 517.03 (West 1999); MISS. CODE ANN. § 93-1-1 (1999); MONT. REV. CODE ANN. § 40-1-103, 401 (Smith 1999); NEV. REV. STAT. ANN. § 122.020 (Michie 1999); N.C. GEN. STAT. § 51-1.2 (1998); N.D. CENT. CODE § 14-03-01 (1999); OKLA. STAT. ANN. tit. 43, §§ 3, 3.1 (West 1999); 23 PA. CONS. STAT. ANN. § 1704 (West 1999); S.C. CODE ANN. § 20-1-15 (Law Co-op. 1999); S.D. CODIFIED LAWS §§ 25-1-1, 38 (Michie 1999); TENN. CODE ANN. § 36-3-104, 113, 306 (1999); TEX. FAM. CODE ANN. § 2.001 (West 1999); UTAH CODE ANN. § 30-1-2 (1999); VA. CODE ANN. § 20-45.2 (Michie 1999); WASH. REV. CODE ANN. § 26.04.010, .020 (West 1999).

64. 1 U.S.C.A. § 7 (West 1999).

legislation has been brought to the foreground again with the recent decision of the Supreme Court of Vermont in *Baker v. Vermont*,⁶⁵ which ruled that LGBT couples are entitled to rights and benefits similar to those granted to heterosexual spouses.⁶⁶ The Supreme Court of Vermont left it to the legislature to devise a remedy,⁶⁷ which it is currently debating.⁶⁸ The article by Mark Strasser in this volume addresses the same-sex marriage issue across the country in more detail.⁶⁹

The movement to provide benefits to same-sex couples similar to those provided to married heterosexual couples has recently gained momentum across the nation. Several states presently offer some type of benefit for same-sex domestic partners.⁷⁰ Sixty-four cities and nineteen counties across the country do as well.⁷¹ In addition, thirty-seven cities and four counties offer some type of registry for same-sex couples who want to register as domestic partners.⁷² The State of California has recently passed such a registry.⁷³

By comparison, as in the criminal law area, Florida finds itself following some trends and behind others in the battles to recognize the long-term relationships of same-sex couples. In spite of Florida's ban on same-sex marriage, a bill to create a domestic partner registry with the extension of health insurance and other benefits to the registrants was introduced in 1999,⁷⁴ and similar legislation is proposed for the 2000 legislative session.⁷⁵

On the local government level, Broward County has passed one of the most progressive domestic partnership laws in the country,⁷⁶ although it has been challenged in court.⁷⁷ Along with the cities of San Francisco,

65. 744 A.2d 864 (Vt. 1999).

66. *Id.* at 889.

67. *Id.* at 886, 889.

68. See Carey Goldberg, *Forced to Act on Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, at A1.

69. See generally Mark Strasser, *Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 23 NOVA L. REV. 769 (2000).

70. See VAN DER MEIDE, *supra* note 33, at 85. The seven states are California, Delaware, Hawaii, Massachusetts, New York, Oregon, and Vermont.

71. *Id.* at 85-86.

72. *Id.* at 86.

73. *Id.*

74. Both versions of the bill died in committee in both the House and Senate. HAWES, *supra* note 16, at 52.

75. S. 686, 102d Leg., Reg. Sess. (Fla. 2000).

76. Broward County, Fla., Code of Ordinances § 16½-150 (1999).

77. See *Lowe v. Broward County*, 6 Fla. L. Weekly Supp. 345 (17th Cir. Ct. Apr. 30, 1999) (denying Broward County's Motion to Dismiss for Lack of Standing and finding that plaintiff does have taxpayer standing to challenge, under Florida law, the constitutionality of the County's Domestic Partnership Act); *Lowe v. Broward County*, 6 Fla. L. Weekly Supp.

Sacramento, Davis, and Seattle, Broward County is one of the few jurisdictions to require or encourage private employers to extend benefits to the domestic partners of employees.⁷⁸ Broward's program offers a bidding preference equivalent to one percent to those employers that offer such benefits to domestic partners to the same extent that they are offered to legally married partners.⁷⁹ There are also more limited registries and benefits offered in Key West, Miami Beach, and Monroe County.⁸⁰ The city of West Palm Beach permits bereavement leave for domestic partners.⁸¹ Furthermore, a bill to provide benefits on a statewide basis is being proposed for the 2000 legislative session.⁸² At this point, seven states offer some type of domestic partner employment benefits to same-sex partners.⁸³ California has a domestic partnership registry.⁸⁴ In addition, forty-one municipal governments have domestic partnership registries and eighty-three offer some type of employment benefit to the domestic partner of their employees.⁸⁵ Seventeen percent of the population in the United States now live in a state, county, or city with a domestic partner registry.⁸⁶

Without legal recognition of their relationships, same-sex couples find themselves forced to attempt to fit themselves into existing legal categories

503 (17th Cir. Ct. Apr. 30, 1999) (entering summary judgment in favor of Broward County and finding that the County's Domestic Partnership Act neither recognized a new marital relationship nor encroached upon an area exclusively reserved to the state). *See also* HAWES, *supra* note 16, at 51. *Lowe* is currently on appeal to the Fourth District Court of Appeal in Florida under case number 99-1664. Florida Courts (visited Apr. 13, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=117>>.

78. BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½ -157 (1999) (stating "[e]xcept where federal or state law mandate to the contrary, in the purchase of personal property, general services, or professional services . . . by means of competitive bid or proposal procedure, a preference in an amount of one (1) percent of the bid or proposal price may be given to a Contractor providing for nondiscrimination of benefits for Domestic Partners").

79. *Id.* *See also* VAN DER MEIDE, *supra* note 33, at 17.

80. KEY WEST, FLA., CODE § 72.32--34 (1999); MIAMI BEACH, FLA., CODE § 62-127 (1999); MONROE COUNTY, FLA., CODE § 14 (1999). *See also* VAN DER MEIDE, *supra* note 33, at 40-42.

81. West Palm Beach, Fla., Ordinance § 90-1 (1990).

82. S. 686, 102d Leg., Reg. Sess. (Fla. 2000).

83. VAN DER MEIDE, *supra* note 33, at 85. The seven states are California, Delaware, Hawaii, Massachusetts, New York, Oregon, and Vermont. *Id.* *See, e.g.*, CAL. GOV'T CODE § 22873 (West 1999) (permitting employers to offer health benefits to employees' domestic partners).

84. CAL. FAM. CODE § 298.5 (West 1999).

85. *See* VAN DER MEIDE, *supra* note 33, at 17. *See, e.g.*, BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-157. (1999).

86. *Id.*

when those relationships end. There are three reported appellate cases where Florida courts expressly address the legal rights between same-sex couples who have dissolved their relationship.⁸⁷ In *Posik v. Layton*,⁸⁸ the Fifth District Court of Appeals upheld a cohabitation agreement between a lesbian couple in which one of the parties, a physician, agreed to provide "support" in the form of liquidated damages should she engage in any of a number of specified acts that would in essence cause the relationship to end.⁸⁹ Although the court was careful to note that Florida recognizes no rights arising from a nonmarital relationship merely because it is similar to a marriage in most relevant respects, it was willing to enforce a contract between two parties who sought to undertake rights and obligations between each other, as long as the agreement was not "inseparably based upon illicit consideration of sexual services."⁹⁰ The court held that, pursuant to the Statute of Frauds,⁹¹ the contract must be in writing.⁹² In a custody dispute between a "biological" mother and a "psychological" mother, the Fourth District Court of Appeals argued that the latter lacked standing to obtain custody, or force visitation from the biological mother when the relationship between the two lesbian partners ended.⁹³ The court noted that the Supreme Court of Florida had recognized in *Von Eiff v. Azicri*,⁹⁴ that Florida's constitutional right to privacy precluded intervention into the parent's fundamental rights absent a showing of demonstrable harm to the child.⁹⁵ Prior to this case, the First District Court of Appeals rejected the claim of a nonbiological lesbian parent that there is a right to shared parental responsibility or visitation.⁹⁶ The concurrence in *Kazmierazak* noted that the problem for the lesbian co-parent was primarily a result of the statutory ban against homosexual adoptions.⁹⁷

In addition to ruling on disputes between same-sex partners, Florida appellate courts have also considered cases between lesbian mothers and their heterosexual partners. As noted in the Terl article,⁹⁸ a series of three

87. See *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th Dist. Ct. App. 1997); *Packard v. Packard*, 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997); *Maradie v. Maradie*, 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996).

88. 695 So. 2d 759 (Fla. 5th Dist. Ct. App. 1997).

89. *Id.* at 760-63.

90. *Id.* at 762.

91. FLA. STAT. § 725.01 (1999).

92. *Posik*, 695 So. 2d at 762.

93. *Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. 4th Dist. Ct. App. 1999).

94. 720 So. 2d 510 (Fla. 1998).

95. *Kazmierazak*, 736 So. 2d at 107.

96. *Music v. Rachford*, 654 So. 2d 1234, 1235 (Fla. 1st Dist. Ct. App. 1995).

97. See *Kazmierazak*, 736 So. 2d at 111 (Gross, J., concurring).

98. See Terl, *supra* note 1, at 826-28.

cases from the Panhandle region of the state generated concern in the LGBT community across the state and nation.⁹⁹ In *Ward v. Ward*,¹⁰⁰ the trial court removed custody of a child from a lesbian mother to a father who had murdered his former wife.¹⁰¹ The appellate court, however, went to some length to deny that its decision was based upon the sexual orientation of the mother.¹⁰² The other two cases, *Maradie v. Maradie*¹⁰³ and *Packard v. Packard*,¹⁰⁴ also involved trial court decisions that awarded custody to the nongay parent because of the sexual orientation of the lesbian mother.¹⁰⁵ The *Maradie* case resulted in reversal because the trial court had judicially noticed that "a homosexual environment is not a traditional home environment, and can adversely affect a child."¹⁰⁶ The court specifically rejected the opportunity to determine "whether trial courts can deprive a mother of custody of her child solely because the mother is a lesbian."¹⁰⁷ In *Packard*, the appellate court reversed a trial court finding in favor of the husband based upon the fact that he would provide "a more traditional family environment" without more specific factual findings to demonstrate upon what this conclusion was based.¹⁰⁸ Unfortunately, without a more direct admonition to the trial court, it reinstated its original order, but was more careful in its opinion on remand.¹⁰⁹ Despite the controversy and attention given to these cases, the narrowly-drawn opinions have made it difficult to measure their ultimate impact. Although all three refused to let stand decisions unsupported by little more than conclusory declarations that arguably demonstrated homophobic thinking, the appellate courts in each did not explicitly reject the consideration of sexual orientation as a factor in custodial fitness or clarify its relevance in a custodial dispute. A new case is currently awaiting decision from the Second District Court of Appeal. In

99. See *Packard v. Packard*, 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997); *Ward v. Ward*, 742 So. 2d 250 (Fla. 1st Dist. Ct. App. 1996); *Maradie v. Maradie*, 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996).

100. 742 So. 2d 250 (Fla. 1st Dist. Ct. App. 1996).

101. *Id.* at 252.

102. *Id.* "Although this case involves the modification of primary residential custody from a mother who is a lesbian, the focus of this case is not on the mother's sexual orientation, but on the best interests of the child." *Id.*

103. 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996).

104. 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997). This case is also interesting because the wife had engaged in a sexual ménage à trois with her husband and her lesbian lover during the marriage. *Id.* at 1293. The trial court apparently did not discuss this aspect of the father's sexual conduct in determining which household was more "traditional." *Id.*

105. *Maradie*, 680 So. 2d at 541; *Packard*, 697 So. 2d at 1293.

106. *Maradie*, 680 So. 2d at 541.

107. *Id.*

108. *Packard*, 697 So. 2d at 1293.

109. *Id.*

Doe v. Doe,¹¹⁰ the trial court, amongst other findings, felt that the stigma and insults that a child of a lesbian mother would suffer in fact justified placement of the children with the father.¹¹¹ This case oddly parallels another Florida case, *Palmore v. Sidoti*,¹¹² in which the United States Supreme Court rejected this “stigma” argument in a race discrimination context.¹¹³

In the adoption area, challenges to Florida’s ban against adoption by homosexuals continue.¹¹⁴ At this point, Florida is the only state that bans homosexuals from adopting by statute,¹¹⁵ although some other states are currently contemplating similar measures.¹¹⁶ New Hampshire, the only other state to have a statutory ban on homosexual adoptions, repealed its measure in 1999.¹¹⁷ The Florida statute has been challenged in court a number of times. A trial court in Key West found the statute unconstitutional, but the state neither defended nor appealed the decision.¹¹⁸ The next case to challenge the statute was *HRS v. Cox*,¹¹⁹ which denied the Due Process and Privacy claims of the petitioners, but remanded the Equal Protection Claim

110. See *Lambda Legal Case: Doe v. Doe* (visited Apr. 10, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=102>>. At the request of the litigant in this case, the names of Doe have been used to preserve anonymity.

111. *Id.*

112. 466 U.S. 429 (1984).

113. *Id.* at 433.

114. See generally Tiffani G. Lee, Note, *Cox v. Department of Health and Rehabilitative Services: A Challenge to Florida’s Homosexual Adoption Ban*, 51 U. MIAMI L. REV. 151 (1996) (discussing the legislative history of Florida’s gay exclusion statute and the constitutional claims raised in *Cox*); Sonja Larsen, Annotation, *Adoptions of Child by Same-Sex Partners*, 27 A.L.R. 5TH 54 (1995) (discussing reported cases throughout the country regarding the issues surrounding same-sex adoptions). See also *infra* note 123.

115. See FLA. STAT. § 63.042(3) (1999) (providing “No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

116. HAWES, *supra* note 16, at 9. During 1999, nine states considered some type of ban on “‘homosexuals’ or unmarried couples from adopting . . . becoming foster parents, or gaining custodial rights.” *Id.* In addition, Arkansas has banned homosexuals from being foster parents through the child welfare regulatory process and Utah has used the same type of process to prohibit unmarried couples from adopting or serving as foster parents. *Id.* at 6.

117. 1999 N.H. Laws ch. 18 (H.B. 90) (codified as amended at N.H. REV. STAT. ANN. § 170-B:4 (1999)).

118. Seebol v. Farie, 17 Fam. L. Rep. (BNA) 1331 (Fla. 16th Cir. Ct. 1991), *reprinted in* State Dep’t of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1221–29 (Fla. 2d Dist. Ct. App. 1993).

119. 656 So. 2d 902 (Fla. 1995).

for trial.¹²⁰ Weary from the delays and harassment resultant from this litigation, Cox decided to voluntarily dismiss the case after the remand. This case was followed by a challenge in Broward County filed by June Amer. In *Amer v. Johnson*,¹²¹ the trial court found the statute to be constitutional.¹²² The decision has not been appealed. Another case has been filed in the Southern District of Florida more recently by the American Civil Liberties Union and the Children First Project at Nova Southeastern University.¹²³

A number of things are noticeable in the family law area. Florida has joined the trend to explicitly express opposition to same-sex marriage.¹²⁴ A number of local governments within the state have adopted measures, however, that provide various types of recognition to same-sex couples.¹²⁵ Pending the signature of Utah's governor to legislation banning adoption by homosexuals,¹²⁶ Florida is alone in its statutory ban. Its decisions in the child custody area are not unlike those in a number of other states. One of the things most striking about the child custody area of the law is the near invisibility of LGBT families in the reported opinions. Not only is the number of opinions small, they are all from the last decade. If one were to base one's conceptualization of reality by looking at the Southern Reporter, one might think that lesbian and gay families did not exist until the 1990s. The failure to recognize parental rights for LGBT parents in the adoption and second parent cases have a seriously detrimental impact upon the formation and continuation of LGBT families in Florida. Aside from the adoption challenges and the refusal to recognize the rights of nonbiological parents, the other reported appellate opinions in recent years have arguably been more helpful, but they have been cautious, and it is therefore difficult to measure their ultimate impact.

120. *Id.* at 903. For a lengthier critique of this case, see William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579 (1996).

121. *Amer v. Johnson*, No. 92-14370 (11) (Fla. 17th Cir. Ct. Sept. 5, 1997) (final order upholding constitutionality of statute).

122. *Id.*

123. See *Lofton v. Butterworth*, Case No. 99-10058-Civ-King (S.D. Fla. filed May 26, 1999). See also HAWES, *supra* note 16, at 51.

124. See FLA. STAT. § 741.212 (1999) (providing "Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction . . . are not recognized for any purpose in this state").

125. See, e.g., MIAMI BEACH, FLA., CODE §§ 62-126 to 62-129 (1999); MONROE COUNTY, FLA., CODE § 14 (1999). See also *supra* notes 76, 80, 81.

126. H.B. 103, 2000 Gen. Sess. (Utah 2000). See also William E. Adams, Jr., *Whose Family Is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579 (1996).

V. FUTURE TRENDS

According to one organization that studies trends in the states concerning legislation effecting LGBT persons, the number and percentage of favorable bills for such persons in state legislatures has increased over the last few years.¹²⁷ In addition, there is evidence of a trend toward the favorable legislation actually being passed or moving farther in the process than in previous years.¹²⁸ Part of this has arguably been the result of the election of lesbian or gay state legislators.¹²⁹ On the other hand, the increased pressure to pass legislation to protect the free exercise of religion also may pose problems as some may interfere with existing civil rights protections for the LGBT community.¹³⁰ Florida considered such a bill in 1999.¹³¹

If the rights of LGBT persons are to advance in Florida, some of the protections must undoubtedly emerge through the legislative process. Not only have Florida courts seemed reluctant to take bold steps to recognize rights for LGBT persons, it is also questionable whether rights gained through the judicial process without popular support can endure. If the experience of other states is applicable,¹³² legislative progress may be accelerated by the election of legislators who are openly lesbian, gay, bisexual, or transgendered, although this should not be deemed a necessary prerequisite. At present, Florida has four openly lesbian or gay elected judges and two city council persons.¹³³

However, for significant progress to be made within the near future, the judiciary also has a role to play. This is particularly true in areas of the law,

127. In 1999, 214 favorable and 81 unfavorable bills were introduced in state legislatures across the country. HAWES, *supra* note 16, at 4. In 1996, the numbers were 61 and 99, respectively. *Id.*

128. *Id.* at 4–5. A number of states either passed or moved hate crimes and civil rights bills farther in the legislative process than ever before. *Id.*

129. Some believe the passage of the employment nondiscrimination measure in Nevada and the repeal of the adoption ban in New Hampshire was in part the result of the work of openly-gay or lesbian legislators. *See id.*

130. HAWES, *supra* note 16, at 12. *See also* David Kushner, *Free Exercise, Fair Housing and Marital Status—Alaska Style*, 12 ALASKA L. REV. 335 (1995).

131. HAWES, *supra* note 16, at 12.

132. *Supra* note 129.

133. HAWES, *supra* note 16, at 175–78. An openly gay man ran for and won the election for the Mayor of the town of Wilton Manors in Broward County, Florida. Lisa Arthur, *Gays Raising Their Political Profile in Wilton Manors Council Election*, MIAMI HERALD, Feb. 7, 2000, at B3. As a result of his election, the municipality became the second one in the country to have a gay majority on its governing body. *Id.* The author is also personally acquainted with a newly-elected city commissioner in the town of South Miami, who recently ran a campaign as an openly-gay candidate.

such as the family law, where judges are granted broad discretion. As can be seen from the *Packard* case above, an overly cautious opinion may permit trial judges to make decisions without having to justify their possible biases with careful, considered factual findings supported by recognized scientific evidence, as opposed to stereotypical fears and misgivings.

Such unlimited discretion should not avoid serious scrutiny where the discretion is used to the disadvantage of a group that has been subjected to a long history of state-supported legal animus. As the Terl article makes clear, such is the history of the treatment of lesbians and gays in Florida in social, political, and legal spheres. Despite the pockets of progress in its urban centers, the state itself remains remarkably unfriendly to its LGBT citizens. Except for its hate crimes provisions, Florida's state laws are mostly hostile or unsupportive. One of thirty states to ban same-sex marriages, Florida remains in the minority on other issues. It is nearly alone in its statutory ban on adoptions, and it is also one of a shrinking number of states with its ban on adult consensual same-sex activity. Its failure to seriously consider an antidiscrimination statute finds the state once again trailing most of the country in considering an issue that could assist LGBT persons.

This history and current state of affairs should cause the courts to seriously consider the role that the state's past practices have on current legal doctrine. Whether it is considering the "sodomy" statute, the adoption ban, or the consideration of the wide variety of family issues that courts will most likely be facing as the numbers of lesbian and gay families continues to grow, the courts should contemplate the impact of its history in regard to LGBT litigants. This is especially true of the adoption statute, which was passed during the height of the Anita Bryant campaign.¹³⁴ The prejudice and resultant stigmatization of LGBT Floridians is one that must not be ignored if the state is to transcend its past. Although its laws and judicial interpretations do not make its approach particularly unusual for a southern state, one must ask whether such an increasingly urban, cosmopolitan state, which would like to portrayed as a trend-setter and center of culture and commerce, wants to find itself so situated in the twenty-first century.

134. See ch. 77-140, § 1, 1977 Fla. Laws 466, 466 (codified at FLA. STAT. § 63.042(3) (1977)).